

STATE OF MICHIGAN
COURT OF APPEALS

KASEY, INC., KARL SAMUELS, JR. and
CHRISTINA SAMUELS,

UNPUBLISHED
January 3, 2012

Plaintiffs-Appellees,

v

ALPINE REALTY NOW, INC., PATRICK
SHAW and DONNA DANYO,

No. 298002
Wayne Circuit Court
LC No. 08-104184-CZ

Defendants-Appellants.

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Defendants Alpine Realty Now, Inc. (Alpine), Patrick Shaw (Shaw) and Donna Danyo (Danyo), appeal as of right a final judgment in favor of plaintiffs, Kasey, Inc., Karl Samuels, Jr. (Karl) and Christina Samuels (Christina), in this multifaceted civil case regarding the sale of the Tree House Bar and Grill. On appeal, defendants argue that (1) the evidence was insufficient to find defendants liable for breach of contract, (2) the evidence was insufficient to find Danyo liable for any claim, (3) the evidence was insufficient to find that Shaw and Danyo engaged in a civil conspiracy, (4) the evidence was insufficient to find that defendants engaged in concerted action designed to breach fiduciary duties owed to plaintiffs, and (5) the exemplary damages award was excessive and not supported by the evidence. We affirm.

I. FACTS

In 2006, Plaintiffs decided to list the Tree House Bar and Grill for sale. Kasey, Inc. entered into a listing agreement with Alpine, and agreed that the asking price for the bar would be \$350,000. The agreement was signed by Shaw and Christina. Shaw found one couple interested in purchasing the bar, John and Yvonne Wornell. The Wornells offered to purchase the real property and the business for \$330,000. When Shaw presented the Wornells' written offer to plaintiffs, he told them that they "wouldn't be able to get any more, that that's all the Wornells had, they couldn't afford to pay any more," and dissuaded the Samuels from making a counter-offer. Plaintiffs then accepted the offer and signed a preliminary purchase agreement. The preliminary purchase agreement, which was signed by both Shaw and Danyo in addition to Yvonne and Christina, stated "[t]here are not other hidden oral or other representations between the broker and any of the parties herein."

Three days before closing the sale, the plaintiffs learned that defendants and the Wornells had entered into various hidden agreements. According to Yvonne, Shaw approached her and offered to help finance her purchase of the bar by lending the Wornells \$20,000 from his commission on the sale. To facilitate repayment of the loan, the Wornells agreed to allow Shaw to place gaming machines in the bar and pay the loan off from the proceeds of the machines. The written agreement also granted Shaw and Danyo a security interest in the bar. Defendants never disclosed that they were making a loan to the Wornells or entering a business deal with them. Christina testified that the plaintiffs would not have accepted the Wornells' offer if they had been aware of defendants' side deals. Plaintiffs also asserted that defendants deliberately conspired to keep plaintiffs from finding out about defendants' deals with the Wornells.

The jury found in favor of plaintiffs on their counts of breach of fiduciary duties, breach of contract, fraud, concert of actions to breach fiduciary duties, concert of actions to commit fraud, civil conspiracy, and misappropriation of a business opportunity belonging to plaintiffs. The jury awarded plaintiffs a total of \$66,801, including \$27,000 in exemplary damages.

II. SUFFICIENCY OF THE EVIDENCE

Defendants argue on appeal that the trial court erred in denying their motion for judgment notwithstanding the Verdict (JNOV) because there was insufficient evidence to support the jury's verdict on the breach of contract, breach of fiduciary duty, silent fraud, civil conspiracy, and concerted action claims. A trial court's decision on a motion for JNOV is reviewed de novo. *Prime Financial Serv LLC v Vinton*, 279 Mich App 245, 255; 761 NW2d 694 (2008). "The trial court should grant a JNOV motion only when the evidence and all legitimate inferences viewed in a light most favorable to the nonmoving party fails to establish a claim as a matter of law." *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App 609, 618; 769 NW2d 911 (2009), citing *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 733; 761 NW2d 454 (2008). The jury verdict must stand if reasonable jurors could have honestly reached different conclusions. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009).

A. BREACH OF CONTRACT

Defendants argue that they were entitled to judgment as a matter of law because there was no evidence that they breached their contractual duties to plaintiffs. The listing agreement granted defendants the exclusive right to sell the bar for a period of six months. Defendants contend that they did not breach the contract because they produced a ready, willing, and able buyer according to the terms of the contract. However, the contract required plaintiffs' consent for any deal with a price less than \$350,000. Defendants correctly point out that plaintiffs accepted the sale to the Wornells, but that consent was procured by fraud, and is not valid. *Linsley v Sinclair*, 24 Mich 380 (1872). Defendants informed plaintiffs that the Wornells could not offer more than \$330,000, when in reality the Wornells were prepared to pay the full asking price.

Moreover, we note that every contract contains an implied covenant of good faith and fair dealing that neither party will do anything that adversely affects the other party's right to receive the fruit of the agreement. *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992) (holding that the law recognizes an implied covenant of good faith and

fair dealing in all contracts). Therefore, defendants had a contractual obligation not to engage in any conduct that would adversely affect plaintiffs' ability to receive \$350,000 for their bar, and had a contractual obligation to market the bar at that price. On this record, there was sufficient evidence for a jury to find that defendants breached their contractual obligations.¹

B. BREACH OF FIDUCIARY DUTY

Defendants challenge the jury's verdict against Danyo on the ground that there was insufficient evidence to establish that she was a fiduciary. We disagree. According to Michigan law, a real estate broker is in a fiduciary relationship with his or her clients. *Brotman v Roelofs*, 70 Mich App 719, 729; 246 NW2d 368 (1976), citing *Parker v Poll*, 16 Mich App 542; 168 NW2d 425 (1969). The duties of loyalty, fidelity, care and disclosure may arise impliedly from the agent's position or out of an express agency contract in a listing agreement. *Brotman*, 70 Mich App at 729.

It is clear that Danyo was in a fiduciary relationship with plaintiffs and owed them the duties of loyalty, fidelity, care and disclosure. Defendants erroneously assert that Danyo owed no fiduciary duty to plaintiffs because she did not sign the listing agreement. An agency relationship can arise from acts and events that reflect acquiescence to or recognition of an agency relationship. See *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992) (An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account).

In this case, plaintiffs hired Alpine as their broker to sell the Tree House Bar and Grill. Shaw and Danyo were both licensed real estate agents employed by Alpine, and they both acted as plaintiffs' agents in the transaction. Shaw was plaintiffs' listing agent, but Danyo prepared all the documents relating to the sale of the bar, including the listing agreement, the preliminary purchase agreement, the offer to purchase real estate, and the undated commission agreement. She also prepared the contract for machine lease agreement. Danyo was present when Yvonne and John Wornell executed the preliminary purchase agreement and the offer to purchase the bar. In fact, Danyo witnessed and signed the purchase agreements. Further, Danyo was present at the pre-closing, and she presented and reviewed all the relevant documents with plaintiffs. She was present at the closing of the sale and again reviewed all the documents with plaintiffs. Moreover, Danyo received a real estate commission as a result of the sale of plaintiffs' bar. Plaintiffs testified that they relied on Danyo to draft the closing documents and handle the transfer of the licenses. Based on the foregoing facts, the jury could conclude that an agency relationship existed between Danyo and plaintiffs.

As plaintiffs' real estate agent, Danyo owed plaintiffs fiduciary duties, as did Shaw and Alpine.² *Andrie v Chrystal-Anderson & Assoc Realtors, Inc*, 187 Mich App 333, 335; 466

¹ Defendants argue on appeal that Danyo was not a party to the contract and thus could not have breached it, but defendants stipulated at trial to the existence of the contract among all parties, without exception.

² Defendants do not dispute that Shaw and Alpine were agents for the plaintiffs.

NW2d 393 (1991) (real estate brokers are agents of the seller and owe the seller fiduciary duties). Defendants do not dispute that these duties were breached, only that Danyo had such duties. Because the duties clearly existed, the trial court did not err by denying defendants' motion for JNOV on this ground.

C. FRAUD

Defendants next assert that there was insufficient evidence to sustain the claim of fraud against Danyo. The elements of a claim for fraud are: "(1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury[.]" *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988), quoting *Jaffa v Shackel*, 114 Mich App 626, 640-641; 319 NW2d 604 (1982). "The false material representation needed to establish [silent] fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose." *Clement-Rowe v Mich Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). To establish a claim of silent fraud, a plaintiff must prove that the defendant intended to induce the plaintiff to rely on a nondisclosure and that the defendant had an affirmative duty to disclose. *Id.*

Plaintiffs presented evidence that Danyo, along with Shaw, entered into the loan and gaming deal with the Wornells. The agreement also granted Danyo a security interest in plaintiffs' bar. Danyo admitted that she did not disclose the side deals to plaintiffs. In fact, Danyo and Shaw instructed the Wornells to keep the loan and gaming deal a secret from plaintiffs. A reasonable jury could infer that defendants intended plaintiffs to rely on their nondisclosure to maintain and complete the transaction. Plaintiffs asserted that had they known of the deal, they would not have accepted the Wornells' offer to buy the bar. Accordingly, plaintiffs provided evidence that defendants made a false material representation, that defendants intended plaintiffs to rely upon the representation, and that plaintiffs acted in reliance upon it to their detriment. The trial court correctly denied defendants' JNOV motion because the evidence and all legitimate inferences do not fail to establish, as a matter of law, plaintiffs' fraud claim.

D. CIVIL CONSPIRACY

Defendants next argue that there was insufficient evidence to support the jury verdict that defendants engaged in civil conspiracy. The essential elements of a civil conspiracy are: (1) a concerted action (2) by a combination of two or more persons (3) to accomplish an unlawful purpose (4) or a lawful purpose by unlawful means. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). A claim of civil conspiracy must be based on an underlying actionable tort. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003). Plaintiffs' conspiracy claim was based on fraud and breach of fiduciary duties. As discussed above, as a matter of law, plaintiffs provided sufficient evidence of the underlying torts.

Still, defendants challenge the verdict on the ground that there was no evidence of an agreement or preconceived plan between Shaw and Danyo. Defendants' contention fails. Plaintiffs are not required to provide direct proof of an agreement, nor is it necessary that a formal agreement be proven. *Temborius v Slatkin*, 157 Mich App 587, 600; 403 NW2d 821

(1986). “It is sufficient if the circumstances, acts and conduct of the parties establish an agreement in fact. Furthermore, conspiracy may be established by circumstantial evidence and may be based on inference.” *Id.* Plaintiffs presented evidence that Shaw and Danyo entered into an agreement with one another to loan the Wornells money in exchange for a security interest in the bar and rights to place their gaming machines in the bar. Shaw and Danyo failed to disclose these agreements to plaintiffs. The jury could reasonably infer that Shaw and Danyo had an agreement to breach their duties owed to plaintiffs and to defraud plaintiffs. The trial court did not err in denying JNOV on this ground because there was evidence to support the civil conspiracy claim.

E. CONCERT OF ACTION

Defendants also contend that the jury’s verdict that defendants engaged in concerted action to breach fiduciary duties owed to plaintiffs was not supported by the evidence. Concert of action is not an independent cause of action, but rather a legal theory used to hold multiple actors liable for a result that may only have been directly caused by one of them. *Abel v Eli Lilly & Co*, 418 Mich 311, 338; 343 NW2d 164 (1984).³ As discussed above, the jury properly found each of the defendants directly liable for fraud and breach of fiduciary duty, thus there is no need to resort to a concert of action theory, nor were separate damages awarded for these theories below.

III. EXEMPLARY DAMAGES

Defendants contend that the trial court abused its discretion in denying defendants’ motion for a new trial or remittitur as to the award of exemplary damages.

“Exemplary damages are a class of compensatory damages that allow for compensation for injury to feelings.” *McPeak v McPeak*, 233 Mich App 483, 487; 593 NW2d 180 (1999) (citing *Veselenak v Smith*, 414 Mich 567, 573; 327 NW2d 261 (1982)). Exemplary damages are only available when the defendant’s actions “inspire feelings of humiliation, outrage, and indignity.” *Id.* Defendant’s conduct “must also be malicious or so wilful and wanton as to demonstrate a reckless disregard of plaintiff’s rights.” *Id.* at 487-488. “[I]n breach of contract cases, the general rule is that exemplary damages are not recoverable absent allegation and proof of tortious conduct that is ‘independent of the breach.’” *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 402; 729 NW2d 277 (2006) (quoting *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 423; 295 NW2d 50 (1980)).

However, fraud is actionable even in the absence of a contract. See *City of Novi v Robert Adell Children’s Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005) (elements of fraud do not include existence of a contract). The jury in the present case found defendants liable for fraud and civil conspiracy to defraud. Therefore, the present case is distinguishable from *Kewin*, which merely precluded exemplary damages for a bad-faith breach of contract.

³ The *Eli Lilly* court used the example that three drivers in a drag race could all be held liable for injuries to a bystander who was only physically struck by one of the cars. 418 Mich at 338.

Further, this case is very similar to *Green v Evans*, 156 Mich App 145; 401 NW2d 250 (1985), in which this Court held that exemplary damages could be awarded for a breach of fiduciary duty where the jury specifically considered them separately from plaintiff's financial damages. In that case, a lawyer caused his client to sell a farm for too low a price and without reserving rights for future profits from the farm. The present case involves a similar breach of fiduciary duty plus fraud, and the jury considered exemplary damages separately from economic damages.

Defendants also claim that the trial court should have granted their motion on the grounds that the award for exemplary damages was not supported by the evidence. *Wilson v General Motors Corp*, 183 Mich App 21, 38; 454 NW2d 405 (1990). We review the trial court's denial of remittitur for an abuse of discretion, *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995), and upon review of the record, we find no abuse of discretion in the court's determination. Plaintiffs presented evidence that defendants' tortious conduct amounted to a betrayal of them by a fiduciary and that this did result in humiliation, outrage and indignity. Ms. Samuels testified that she felt betrayed by defendants' conduct and trapped into completing the deal for fear that the Wornells would sue plaintiffs. She testified that she gained 30 pounds as a result of the stress she endured, her hair began falling out, she lost many nights of sleep and that the plaintiffs' marital relationship suffered as a result of defendants' fraudulent actions. Given this evidence, we cannot say that the trial court abused its discretion in upholding an award of \$27,000 in exemplary damages.

Finally, defendants also argue that the trial court applied the incorrect standard on this issue, noting that at the hearing the trial court stated that "the damages in this case would hardly shock the conscious [sic]." We agree that the proper standard is whether the jury award is supported by the evidence, not whether the jury award shocks the conscience. *Wilson*, 183 Mich App at 38. However, the trial court also stated that the damages were "hardly so excessive to indicate the jury was without any reasonable basis to reach the damages in this case" and so applied the proper standard by finding sufficient evidence to support the award.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher